The district court observed that it was "undisputed that the government cannot find, or has not yet found, another country that will accept the petitioners." Pet. App. 9a. Thus, the court found that "the only way to comply with a release order would be to grant the petitioners entry into the United States." *Ibid.* After explaining that it is "settled law that the power to exclude aliens 'is inherent in the executive power to control the foreign affairs of this nation,'" *id.* at 10a (quoting *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950)), and that "the conditions of entry for every alien . . . have been recognized as matters . . . wholly outside the power of [courts] to control," *ibid.* (quoting *Fiallo* v. *Bell*, 430 U.S. 787, 796 (1977)), the district court held that it could not issue such relief:

> These petitioners are Chinese nationals who received military training in Afghanistan under the Taliban. China is keenly interested in their return. An order requiring their release into the United States—even into some kind of parole "bubble," some legal-fictional status in which they would be here but would not have been "admitted"—would have national security and diplomatic implications beyond the competence or the authority of this Court.

Ibid. The court therefore denied the petition for a writ of habeas corpus. *Id.* at 12a.

5. On December 23, 2005, petitioners filed a notice of appeal to the District of Columbia Circuit. Petitioners then filed a motion to expedite the appeal. On January 27, 2006, the court of appeals granted that motion. Pursuant to the court of appeals' order, appellate briefing was completed on March 22, 2006, and oral argument is scheduled for May 8, 2006.

ARGUMENT

Petitioners seek the extraordinary remedy of certiorari before judgment. This Court's rules make clear that such a premature petition will not be granted unless it meets the most stringent criteria for this Court's immediate intervention. See Sup. Ct. R. 11 (certiorari before judgment "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court"). Those criteria are not remotely satisfied here. Petitioners are unable to show irreparable harm of a nature that would warrant immediate review; the court of appeals has agreed to expedite review such that the case will likely be decided in time that petitioners could seek review after judgment during the 2006 Term; the legal issues would benefit from consideration and elaboration by the court of appeals; and the court of appeals' decision or other events could well eliminate the need for this Court's intervention altogether. Accordingly, the petition for a writ of certiorari before judgment should be denied.

1. Certiorari before judgment is particularly inappropriate here because it is highly unlikely that bypassing the court of appeals would hasten the ultimate resolution of petitioners' claims. The court of appeals has expedited review to the point that the case is already fully briefed in that court and set for argument on May 8, 2006. In other words, the case will be argued and likely be decided by the court of appeals before the case could be briefed and argued in this Court. Indeed, given the expedited manner in which the court of appeals is handling the case, that court is likely to issue a decision in such time that petitioners could, if they chose to do so, seek plenary review of such a decision in this Court dur-

ing the 2006 Term. Thus, even if petitioners' arguments had any merit (which, for the reasons discussed below, they do not) there would be no reason to prevent the District of Columbia Circuit from considering the appeal on the fast track on which it has already been placed.[3]

2. Petitioners argue (Pet. 15) that this Court's "intervention is called for to address an urgent, systemic need" for resolution of legal issues relating to the status of detainees at Guantanamo Bay. That argument lacks merit. First, as mentioned above, because the case would likely be amenable to review next Term following a decision by the court of appeals, there is no point in resolving the issues without the benefit of a decision by the court of appeals. Second, at face value, the legal issues in this case are not appreciably different in kind or magnitude than those in other recent cases involving enemy combatants in which this Court has denied petitions for certiorari before judgment. See note 3, *supra*.

Finally, the fact that petitioners are detained (Pet. 18) does not establish that they are suffering irreparable harm requiring this Court's immediate intervention. That is true in virtually every habeas case, and in most criminal cases as well. The fact that the military has

---

[3] Indeed, the case for bypassing the court of appeals here in order to expedite review by this Court is considerably weaker than in other recent cases in which this Court has *denied* petitions for writs of certiorari before judgment seeking review of the President's exercise of his war powers in the ongoing armed conflict with al Qaeda and the Taliban. See *Padilla* v. *Hanft*, 125 S. Ct. 2906 (2005) (denying petition for a writ of certiorari before judgment where expedition in the Fourth Circuit (including the scheduling of oral argument in July 2005) made it reasonably likely that the Court could consider the case during the 2005 Term); *Hamdan* v. *Rumsfeld*, 543 U.S. 1096 (2005) (denying petition for a writ of certiorari before judgment where the clear effect of that denial was to postpone Supreme Court review until the following term).

determined that petitioners' detention is no longer necessary to the war effort and that the United States is actively seeking to find a country into which they may be released does not establish that the case is of "imperative public importance" within the meaning of this Court's Rule 11. To the contrary, as the district court found, petitioners' predicament requires resolution by the political Branches, not the courts. Pet. App. 9a-10a. More to the point, the fact that the government is actively seeking through diplomatic means to facilitate petitioners' release from custody puts them in a more favorable position than other habeas petitioners.

3. The practical arguments against granting certiorari before judgment provide a sufficient basis to dispose of this petition. Petitioners' arguments on the merits also fail to meet the exceptionally high standard that this Court has set for certiorari before judgment. As explained below, there is a threshold jurisdictional bar to petitioners' habeas action and, in any event, their arguments on the merits are unavailing.

a. The Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, Div. A, Tit. X, 119 Stat. 2739, eliminates jurisdiction over habeas actions brought on behalf of Guantanamo detainees. As explained in detail in the government's motion to dismiss in *Hamdan* v. *Rumsfeld*, cert. granted, No. 05-184 (oral argument scheduled for Mar. 28, 2006), Section 1005(e)(1) of the DTA by its terms applies to all pending habeas cases and any other actions brought by Guantanamo detainees. It provides:

> (I) In General.—Section 2241 of title 28, United States Code, is amended by adding at the end the following:

> (e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—
>
> (1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or
>
> (2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—
>
> (A) is currently in military custody; or
>
> (B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.

Petitioners' are aliens detained in military custody at Guantanamo Bay, and their habeas action therefore falls squarely with the terms of Section 1005(e)(1). Because the DTA removes habeas jurisdiction over this action, this action should be dismissed for want of jurisdiction.[4]

---

[4] Because petitioners received a favorable CSRT determination, they have no claim under Section 1005(e)(2) and their case is not properly "in the court of appeals" for purposes of this Court's jurisdiction under 28 U.S.C. 1257. The impact of the DTA on the jurisdiction of the court of appeals will be a prominent feature of briefing in the court of appeals, and that fact further counsels against review at this juncture. The proper scope and effect of the DTA is an issue currently pending before this Court in *Hamdan*, cert. granted, No. 05-184 (oral argument scheduled for Mar. 28, 2006), and in the District of Columbia Circuit in *Al Odah*, No. 05-5064 (argued Mar. 22, 2006). That provides another

b. In any event, even apart from that jurisdictional defect, petitioners' claims are without merit. Petitioners argue that their detention is unlawful and that the district court erred in failing to grant them relief. Petitioners are incorrect on both scores.

Petitioners' detention is lawful. Petitioners went to Afghanistan to receive weapons training at a military training facility supplied by the Taliban near Tora Bora. C.A. App. 233-234. They were receiving that training when Northern Alliance forces approached the military training camp. Petitioners fled to the Tora Bora caves and ultimately to Pakistan, where they were captured by Pakistani forces and turned over to the United States military. Pet. App. 1a; C.A. App. 234. DoD screened petitioners in the zone of combat, determined that they were enemy combatants, and transferred them to the U.S. Naval Base at Guantanamo Bay for detention.

That quintessential military determination was reasonable under the circumstances and is entitled to effect. As a general matter, it is well within the scope of the U.S. military's authority to capture and detain persons who were trained at an enemy-supplied military training base in enemy territory and who were found fleeing that base during the armed conflict. The unconventional nature of the conflict in Afghanistan, in which the enemy purposefully blurs the distinction between combatants and non-combatants, only increases the need for the military to be permitted to make such determinations in a theater of active combat operations. As a plurality of this Court concluded in *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 518 (2004), the AUMF grants

---

basis for denying certiorari before judgment in this case. Because there are many other reasons for denying certiorari before judgment in this case, this petition need not be held pending the disposition in *Hamdan*.

the President the power to detain enemies captured during our armed conflict with al Qaeda and the Taliban.

Petitioners correctly observe (Pet. 5) that the CSRTs, after thoroughly examining all of the information provided by the military and the detainees, ultimately determined that petitioners should no longer be held as enemy combatants, as that term was defined and implemented for the purposes of the CSRTs. That determination does not mean, however, that petitioners' original detention was inappropriate or unauthorized. Through a process unprecedented in the history of armed conflict, and more protective than the one-shot review envisioned by Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War, the U.S. military has conducted a rigorous examination of a detainee's enemy combatant status based on information available at the time of the review, including any new information gathered subsequent to the detainee's capture. Under DoD instructions, the CSRT rulings regarding petitioners establish that it is no longer required that petitioners be detained as enemy combatants; the rulings do not, however, provide a basis to conclude that their initial detention following their capture in a foreign combat zone was unlawful.

The Executive's power to detain enemy combatants necessarily includes the authority to wind up detention in an orderly fashion after a determination has been made that it is no longer necessary to hold a detainee for war-related reasons. Typically, when a CSRT finds that a detainee should no longer be held as an enemy combatant, he is returned to his native country. England Memo, Enclosure 1, at 9 (CSRT Process). But petitioners vigorously oppose being sent to their native country. And the United States, consistent with its policy against returning an individual when it is more likely than not

that he will be tortured (C.A. App. 205), will not return petitioners to China. Thus, they are being detained by the U.S. military pending the outcome of extensive diplomatic efforts to transfer them to an appropriate country. Those efforts are active and ongoing and have been given high priority by the Executive Branch.[5] In the meantime, because petitioners are not eligible to enter the United States, it is not unlawful for the military to continue to detain them at Guantanamo—in the considerably less restrictive conditions of Camp Iguana, see p. 5, *supra*—until they can be properly resettled.

The district court's conclusion that the United States lacks authority to continue to detain those captured during an armed conflict, where the individuals oppose being returned to their native country and cannot safely be returned there, while some other venue for relocation is found, is contrary to both history and logic. Historically, the United States armed forces, like the armed forces of our allies, have continued the detention of prisoners of war following the end of major conflicts when the prisoner objects to repatriation in his native country. For example, at the end of the Korean War, approximately 100,000 Chinese and North Korean prisoners of war refused to return to their native countries, citing fears of execution, imprisonment, or mistreatment in their countries if returned. See Jan P. Charmitz & Harold M. Wit, *Repatriation of Prisoners of War and the 1949 Geneva Convention*, 62 Yale L.J. 391, 392 (1953); Christiane Shields Delessert, *Release and Repatriation of Prisoners of War at the End of Active Hostilities: A Study of Article 118, Paragraph 1 of the Third Geneva Convention Relative to the Treatment of Prisoners of War*

---

[5] The government offered to make a detailed *in camera* and *ex parte* report to the district court describing the ongoing resettlement efforts. C.A. App. 447. The district court declined the offer. *Ibid.*

157-165 (1977) (Delessert). The United Nations Command continued to hold those 100,000 prisoners for more than one and one-half years while it considered whether and how best to resettle them. See *id.* at 163-164.

Likewise, after World War II, Allied Forces spent several years dealing with prisoners of war they detained during the war, including thousands of prisoners who did not wish to return to their native countries. See Delessert 145-156 & n.53 (citing, *inter alia*, the fact that as late as 1948 England held 24,000 German prisoners who objected to being repatriated); Charmitz & Wit, *supra*, at 401 nn.46 & 48, 404 n.70; Christiane Shields Delessert, *Repatriation of Prisoners of War to the Soviet Union During World War II: A Question of Human Rights* in *World in Transition: Challenges to Human Rights, Development and World Order* 80 (Henry H. Han ed., 1979). Similarly, thousands of Iraqis were held in continued detention by the United States and its allies after the end of combat in the prior Gulf War because they objected to being repatriated to their native country. See DoD, *Conduct of the Persian Gulf War: Final Report to Congress* 620 (1992) (discussing the more than 13,000 Iraqi POWs who objected to being repatriated and remained in custody despite the end of hostilities).

In the district court, petitioners contended that their release was mandated by Article 118 of the Third Geneva Convention, which states that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities," Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3406, 75 U.N.T.S. 224, and Article 132 of the Fourth Geneva Convention (Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3606, 75 U.N.T.S. 376),

which provides that "[e]ach interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist." The Geneva Convention does not create judicially enforceable private rights. Instead, as this Court recognized in *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), the Convention's protections "are vindicated under it only through protests and intervention of protecting powers." *Id.* at 789 n.14. See *Hamdan* v. *Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), cert. granted, No. 05-184 (oral argument scheduled for Mar. 28, 2006); see also Gov't Br. at 30-34, *Hamdan*, No. 05-184.

In any event, the provisions on which petitioners rely presuppose that repatriation is possible. Significantly, the International Committee of the Red Cross commentary explains that the term "without delay" does not address the situation where the prisoner refuses to return to his native country. See International Comm. of the Red Cross, *Commentary to the Geneva Convention Relative to the Treatment of Prisoners of War* 541-550 (1960). In those situations, "[e]ach case must * * * be dealt with individually." *Id.* at 548. The general requirement of return without delay does not "affect the practical arrangements which must be made so that repatriation may take place consistent with humanitarian rules." *Id.* at 550.

c. Petitioners mistakenly rely on *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), and *Clark* v. *Martinez*, 543 U.S. 371 (2005), to support their contention that their continued detention is unlawful. There is no conflict with those cases warranting this Court's review, much less review before the court of appeals is afforded an opportunity to pass on the matter. Those cases resolved a question of statutory interpretation in a materially dif-

ferent context, and did not address constitutional issues of the sort petitioners seek to raise.

In both *Zadvydas* and *Clark*, this Court construed an immigration statute, 8 U.S.C. 1231(a)(6), which has no application here. That statute governs the detention of an alien *inside* the United States pending the execution of an immigration *removal* order. In *Zadvydas*, the Court held that this statutory provision "limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States," 533 U.S. at 689, and that six months after the removal order becomes final constitutes a presumptively reasonable period, *id.* at 701. *Clark* confirmed that *Zadvydas*'s interpretation of the statute applies to the removal of inadmissible aliens being held within the United States. See 543 U.S. at 378.

The immigration statute at issue in *Zadvydas* and *Clark*, which addresses detention of an alien in the United States pending the execution of an immigration removal order, is plainly inapplicable to petitioners here. Petitioners, who are not and have never been in the United States, are not being detained under that statute or any other immigration provision. See 8 U.S.C. 1101(a)(38) (defining the geographic scope of the United States for the purposes of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*); DTA § 1005(g), 119 Stat. 2743 (stating that Guantanamo Bay is not part of the United States). Moreover, in *Zadvydas*, this Court stated that it was not announcing a rule that would necessarily apply to immigration cases involving "terrorism or other special circumstances where * * * [there would be a need for] heightened deference to the judgments of the political branches with respect to matters of national security." 533 U.S. at 696. In *Clark*, the Court expanded upon that statement, ex-

plaining that the Court's interpretation of Section 1231(a)(6) would not affect the ability of the government to detain aliens under other authority. 543 U.S. at 379 n.4. Given that petitioners here are not being held pursuant to the INA, the limitation on detention authority under Section 1231(a)(6) recognized in *Zadvydas* and *Clark* has no bearing on petitioners' case.

Furthermore, in construing the immigration statute at issue in *Zadvydas*, the Court relied upon a constitutional-avoidance analysis. That approach is inapplicable here. In *Zadvydas*, the aliens had been admitted for lawful permanent residence. 533 U.S. at 684-685.[6] The Court observed that the analysis would be very different for aliens, like petitioners here, who are outside of the United States. As the Court explained, "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Id.* at 693.

The more relevant immigration case is *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953). There, an alien who had been a 25-year resident of the United States left the country to visit his dying mother. The INS found that he could not legally re-enter. Mezei was stopped at the border and held in detention in the United States because no other country would accept him. He contended that his detention was indefinite and unlawful. The Court found that Mezei had no constitutional right to enter or obtain release into the United

---

[6] In *Clark*, the aliens were seeking admission to the United States. 543 U.S. at 374-375. While the Court gave the detention statute the same construction it gave it in *Zadvydas*, those aliens, as a result of the Court's decision in *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), had no constitutional argument to be released into the United States.

States, even though he had been detained more than two years and even though at the time there was no prospect that another country would accept him. The Court explained that, "[w]hatever our individual estimate of [the decision not to release Mezei] and the fears on which it rests, respondent's right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate." *Id.* at 216. The same rationale applies all the more here because petitioners likewise have no right to enter the United States, have never been present in the United States, and were captured during an armed conflict.[7]

d. Petitioners argue that a court can order the Executive to parole an alien into this country from outside the United States. That is incorrect. The cases on which petitioners rely (Pet. 10-11) deal with aliens who were already physically present in the United States and provide no authority for the relief they seek. Petitioners are held outside the United States on the island of Cuba. The INA defines the "United States" to in-

---

[7] Petitioners also suggest (Pet. 18) that the district court's decision "empties [*Rasul* v. *Bush*, 542 U.S. 466 (2004)] and [*Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004)] of meaning." That is incorrect. Petitioners invoked the habeas jurisdiction that this Court held existed in *Rasul* (though that statutory jurisdiction has now been removed and supplanted in part by the DTA). *Hamdi* recognized that the military has the authority to capture and detain individuals, such as petitioners, who were determined to have associated with the enemy and were in the midst of a foreign combat zone. Moreover, *Hamdi* involved the detention in this country of an American citizen, who enjoyed constitutional rights that aliens detained abroad, such as petitioners, do not possess. See U.S. Br. 43, *Hamdan*, *supra* (No. 05-184). In any event, in *Hamdi*, this Court observed that the due process rights of an American citizen to challenge his wartime detention as an enemy combatant could be satisfied by affording such a detainee an administrative hearing before the military. See 542 U.S. at 538. Petitioners received such process, and more, pursuant to the CSRT process.

clude only "the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States," see 8 U.S.C. 1101(a)(38), and therefore excludes Guantanamo, which is located in Cuba. Further, in the DTA, Congress specified that, for purposes of judicial review of claims brought by detainees at Guantanamo Bay, the geographic scope of the "United States" should be as defined in Section 101(a)(38) of the INA and, "in particular, does *not* include the United States Naval Station, Guantanamo Bay, Cuba." DTA § 1005(g), 119 Stat. 2743 (emphasis added).

In order to make a "lawful entry * * * into the United States," petitioners would have to be "admitted" to this country. 8 U.S.C. 1101(a)(13)(A). A court does not have the power to order the admission of petitioners. See *Fok Yung Yo* v. *United States*, 185 U.S. 296, 305 (1902) ("Congressional action has placed the final determination of the right of admission in executive officers, without judicial intervention."). With limited exceptions not relevant here, the INA provides that an alien outside the United States must have a visa to enter the country. See 8 U.S.C. 1182(a)(7). Petitioners have no such visas, and a court cannot order the Executive to issue them.

Furthermore, a judicial order requiring the government to bring petitioners into the United States not only would conflict with the INA, but also would be contrary to over a century of this Court's jurisprudence recognizing that the admission of aliens is a quintessential sovereign function reserved exclusively to the political Branches of government. As the Court explained long ago, "[t]he power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government." *Fong Yue Ting* v. *United States*, 149 U.S. 698, 713 (1893). That exclusion power is "to be regulated by treaty or by act

of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene." *Ibid.*; see *Lem Moon Sing* v. *United States*, 158 U.S. 538, 546-547 (1895).

Because a district court may not review and override a denial of admission, it follows *a fortiori* that a court may not order admission in the first instance. Nor could a court order that the Government "parole" (Pet. 12) petitioners, which would temporarily admit them into the United States. Although the INA authorizes the parole of aliens who are applying for admission, 8 U.S.C. 1182(d)(5), the decision to parole—like the decision to admit—is vested solely in the Executive Branch's unreviewable discretion. See 8 U.S.C. 1182(d)(5)(A), 1252(a)(2)(B)(ii). Aside from admission or parole, there is no way for petitioners to be lawfully present in the United States. Under 8 U.S.C. 1182(a)(9)(B)(ii), an alien who "is present in the United States without being admitted or paroled" is "unlawfully present." See 8 U.S.C. 1182(a)(6)(A)(i) (aliens who have not been "admitted or paroled" are inadmissible).[8]

---

[8] Last year, Congress clarified that the comprehensive preclusion of judicial review over discretionary immigration decisions also encompasses habeas review. In the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302, Congress amended the INA to make explicit that no court has jurisdiction under 28 U.S.C. 2241 or "any other habeas corpus provision" to review such discretionary decisions. See REAL ID Act § 106(a), 119 Stat. 310; see also *id.* § 101(f)(2), 119 Stat. 305 (providing that there is no jurisdiction "regardless of whether the judgment, decision or action is made in removal proceedings").

CONCLUSION

The petition for a writ of certiorari should be dismissed for lack of jurisdiction or denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

DOUGLAS N. LETTER
ROBERT M. LOEB
ERIC D. MILLER
Attorneys

MARCH 2006

Supreme Court, U.S.
FILED
APR 5 - 2006
OFFICE OF THE CLERK

No. 05-892

IN THE

Supreme Court of the United States

ABU BAKKER QASSIM and ADEL ABDU' AL-HAKIM,

Petitioners,

v.

GEORGE W. BUSH, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

BARBARA OLSHANSKY
Deputy Director
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6439

SABIN WILLETT
Counsel of Record
RHEBA RUTKOWSKI
BINGHAM MCCUTCHEN LLP
150 Federal Street
Boston, MA 02110
(617) 951-8000

SUSAN BAKER MANNING
BINGHAM MCCUTCHEN LLP
1120 20th Street NW, Ste. 800
Washington, D.C. 20036
(202) 778-6150

Counsel for Petitioners

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY FOR THE PETITIONERS 1

A. The Executive's Resort To Words Of Resonance.. 2

B. The Petition Merits Certiorari Review..... ..6

1. The Detainee Treatment Act does not apply to Petitioners' claims and is not retroactive. 6

2. The judiciary has the power and duty to provide a remedy for unlawful Executive imprisonment..... 7

3. The district court was obliged to fashion a remedy.9

C. Certiorari Before Judgment Is Warranted..... 10

TABLE OF AUTHORITIES

CASES

Al Odah, Khaled A.F. v. United States, D.C. Cir. No. 05-5064 7

Boumediene v. Bush, D.C. Cir. No. 05-5062 7

Clark v. Martinez, 543 U.S. 371 (2005) 9

In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005) 8

Felker v. Turpin, 518 U.S. 651 (1996) 2

Hamdan v. Rumsfeld, 543 U.S. 1096 (2005) 10

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) 10

United States v. Nixon, 418 U.S. 683 (1974) 1

Padilla v. Hanft, 125 S. Ct. 2906 (2005) 10

Rasul v. Bush, 542 U.S. 466 (2004) ..... *passim*

Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953) 6, 8, 9

Zadvydas v. Davis, 533 U.S. 678 (2001) 9

FEDERAL STATUTES AND RULES

28 U.S.C. § 1257 1

28 U.S.C. § 2241(2)(a) 1, 6

28 U.S.C. § 2243 9

The Detainee Treatment Act of 2005, Pub. L. No. 109-148, Title X of the Defense Appropriation Act, H.R. 2863, 109th Cong., 1st Sess. ..... *passim*

Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) 5, 7

MISCELLANEOUS

Amicus Curiae Brief of the American Civil Liberties Union in Support of the Petition for Certiorari 2, 9

Appellees-Cross-Appellants' Supplemental Brief Addressing the Effect of Section 1005 of the Detainee Treatment Act of 2005 on These Appeals, *Al Odah v. Bush* (D.C. Cir. Nos. 05-5064, 05-5095-116, filed Jan. 25, 2006) 7

John R. Bolton, Under Sec'y for Arms Control and Int'l Sec. Affairs, Dep't of State, U.S. Statement at Plenary Session to the UN Conf. on the Illicit Trade in Small Arms and Light Weapons in All its Aspects (July 9, 2001) 5

Brief Amici Curiae of More than 300 Detainees Incarcerated at U.S. Naval Station, Guantánamo Bay, Cuba, and their Family Members, in Support of Petitioner and in Support of Jurisdiction (filed Jan. 6, 2006) (*Hamdan*) 7

Brief Amici Curiae of More than 300 Detainees Incarcerated at U.S. Naval Station, Guantánamo Bay, Cuba in Support of Petition (*Qassim*) 2, 10

Brief for Appellees, *Qassim v. Bush* (D.C. Cir. No. 05-5477, filed March 15, 2006) 6

Brief of Petitioners-Appellants and Reply Brief of Petitioners-Appellants *Qassim v. Bush* (D.C. Cir No. 05-5477, filed Feb. 10, 2006 and March 22, 2006) 7

Brief of Respondent in Opposition, *Hamdan v. Rumsfeld*, No. 04-702 (filed Dec. 2004) 10

Brief of Respondent in Opposition, *Padilla v, Hanft*, No. 04-1342 (filed May 9, 2005) 10

Brief of the Uyghur American Association as Amicus Curiae in Support of Petitioners Request for a Writ of Certiorari before Judgment 2, 5, 10

Chip Brown, *The Freshman*, N.Y. TIMES MAG., Feb. 26, 2006. 4

Cumberland Tactics 5

Mark Denbeaux *et al.*, REPORT ON GUANTANAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA (2006) 3

ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY (N.Y. Univ. Press 2001) 9

Guantánamo Detainees' Second Supplemental Brief Addressing the Effect of the Detainee Treatment Act of 2005 on this Court's Jurisdiction Over the Pending Appeals, *Al Odah v. Bush*, Nos. 05-5064, 05-5095-116 (D.C. Cir. Mar. 10, 2006) 7

Hamdan v. Rumsfeld, No. 05-184, May 28, 2006 Oral Argument Transcript 6, 10

Colin Harrison, *High: Vegas on $1,000 a Day*, N.Y. TIMES, Mar. 19, 2006 5

National Rifle Association, Education & Training Programs, Basic Firearm Training Program 4

OFFICE OF THE UN COORDINATOR FOR AFGHANISTAN, VULNERABILITY AND HUMANITARIAN IMPLICATIONS OF UN SECURITY COUNCIL SANCTIONS IN AFGHANISTAN 3

ROBERT L. STERN, *ET AL.*, SUPREME COURT PRACTICE, § 2.4 (8th ed. 2002) 1

Supplemental Brief of Appellants Regarding Section 1005 of the Detainee Treatment Act of 2005, *Boumediene v. Bush*, No. 05-5062 (D.C. Cir. Jan. 25, 2006) 7

Second Supplemental Brief of Appellants Regarding Section 1005 of the Detainee Treatment Act of 2005, *Boumediene v Bush*, No. 05-5062 (D.C. Cir. Mar. 10, 2006) 7

TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL TRIBUNAL (1947) 8

REPLY FOR THE PETITIONERS

The Executive's[1] obstructionism and the erroneous conclusion of the court below that the judiciary is powerless to do anything about illegal Executive imprisonment have created a crisis of the first magnitude -- one that threatens the system of checks and balances that grounds our Constitution as well as the very lives of the men imprisoned at Guantánamo. The public importance of the question presented in this case cannot be overstated.

But why should the Court grant certiorari now, with oral argument in the court of appeals set for May 8, 2006? The answer is crystallized in footnote four of the Executive's opposition. The Executive has avoided the mandate of *Rasul v. Bush*, 542 U.S. 466 (2004), for almost two years. That footnote shows its plan for the next two, and that plan *applies to every pending habeas case outside the military tribunal context*. There the Executive says that, "[b]ecause petitioners received a favorable CSRT determination, they have no claim under Section 1005(e)(2) [of the Detainee Treatment Act of 2005 (the "Act")] and their case is not properly "in the court of appeals" for purposes of this Court's jurisdiction under 28 U.S.C. § 1257."[2] This argument proceeds from the Act's language purporting to confine review in the court of appeals to challenges to the "validity of any final decision of a [CSRT] that an alien is properly detained as an enemy combatant." Section 1005(e)(2)(A), codified at 28 U.S.C. § 2241(2)(A). Thus, the Executive argues, if, as in this case, an alien secures a CSRT determination that he is *not* an enemy combatant, no court at all has jurisdiction to order his release.

All of the other *habeas* appeals now plodding their way through the court of appeals involve a contest over whether the detainee is an "enemy combatant," and legal questions as to

---

[1] Unless otherwise indicated, capitalized terms have the meanings ascribed to them in the petition.

[2] This case is properly "in" the court of appeals. *See* Pet. 8; *United States v. Nixon*, 418 U.S. 683, 690-92 (1974); Robert L. Stern, *et al.*, SUPREME COURT PRACTICE, § 2.4 (8th ed. 2002).

whether that dispute should be resolved in the district courts under *habeas* review or in the court of appeals under the Act. The Executive now says that once that dispute is resolved in favor of the detainee, it will be free to extend imprisonment at its pleasure with no court review at all. That means that in every case of the hundreds pending in which, as in this one, a detainee is shown to have been wrongly detained, a new round of Executive obstructionism will commence -- with still more years of litigation, and the interminable stays, appeals, and delays that have already rendered judicial review all but useless. Quite apart from its Kafkaesque legal premise, this consequence should be intolerable to the Court as a practical matter.

Guantánamo is at the precipice. As the systemic failure to implement *Rasul* now reaches its second anniversary, suicide attempts and hunger strikes have become common. *See* Detainees' Br. 10-19.[3] Only prompt intervention by this Court to vindicate its own mandate can prevent the rule of law itself from being drowned in this intensifying whirlpool of desperation.

If the Court were to grant certiorari now and expedite the merits briefing (briefs could be submitted swiftly, as the case is fully briefed now in the court of appeals), it could decide this case before rising for the summer recess, as was done in *Felker v. Turpin*, 518 U.S. 651 (1996) (certiorari granted May 3, 1996; argued June 3, 1996; decided June 28, 1996). This is just that extraordinary case for which the statute and rule permitting review before judgment exist.

A. The Executive's Resort To Words Of Resonance

The Executive repeatedly incants incendiary words such as "weapons training," "fleeing," "Afghanistan," "military facility,"

---

[3] Amicus briefs in support of the petition have been filed on behalf of more than 300 detainees incarcerated at Guantánamo ("Detainees' Br."), the Uyghur American Association ("Uyghur Br."), and the American Civil Liberties Union ("ACLU Br.").

"Taliban," "Tora Bora" to frighten the reader[4] and divert attention from the most salient fact in this case: the Executive itself concluded that Petitioners are not "enemy combatants" and, therefore, were not "part of or supporting Taliban or Al Qaeda forces or associated forces." Pet. 4. As for "weapons training," the Executive concluded that neither Petitioner is a "person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." *Id.*

The Executive does not claim that Petitioners had any affiliation with or even sympathy for the Taliban or that the Taliban trained or employed them. Knowing that to be false, it darkly asserts that the men were trained at a *facility* "supplied by the Taliban." Opp. 11. But the Taliban controlled essentially all property and commercial activity in most regions of pre-war Afghanistan.[5] Does that mean simply that the Taliban sold or rented the real property to whoever operated it? We do not and cannot know because there was no return, no factual hearing, and

---

[4] The general proposition that Guantánamo houses "terrorists" and "enemy combatants" is myth. According to the CSRT findings, only five percent of Guantánamo detainees were taken on a battlefield. Mark Denbeaux *et al.*, REPORT ON GUANTANAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA 2 (2006), http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf ("DOD DATA"). Most, like these Petitioners, were sold for bounties by local tribesmen who received leaflets promising enormous (by local standards) amounts of cash. *Id.* at 3. CSRT records disclose not a single hostile act in the case of more than half of the detainees. DOD DATA 2; Detainees' Br. 6-10. The truth about the men held at Guantánamo has, until recently, remained unknown because of the refusal of the Executive and the courts to follow the mandate of *Rasul* and "consider in the first instance the merits of petitioners' claims." 542 U.S. at 485.

[5] OFFICE OF THE UN COORDINATOR FOR AFGHANISTAN, VULNERABILITY AND HUMANITARIAN IMPLICATIONS OF UN SECURITY COUNCIL SANCTIONS IN AFGHANISTAN 4 (Dec. 2000), http://www.humanitarianinfo.org/sanctions/handbook/docs_handbook/OCHA%20-%20Sanctions%20in%20Afghanistan.pdf (last visited Apr. 2, 2006); DOD DATA 16.

no chance to traverse a return. We do know -- because the CSRT so concluded -- that Petitioners were not "part of or supporting Taliban or al Qaeda forces, or associated forces."[6] Pet. 4.

The Executive also calls the Afghan village where the men stayed a "military training camp." Opp. 11. Even if that were true, the world is full of military training camps. Was this one hostile to the U.S.?[7] For all this record shows, the "military training camp" that General Hood speaks of (in a document that Petitioners were never permitted to address) was as supportive of U.S. interests as were the "camps" of the Northern Alliance. There is no evidence -- indeed, no overt assertion, although the implication is powerful and intentional -- that Petitioners were "trained" with malign or criminal intent toward U.S. interests, or that the "camp" had any connection to any conflict in which the President was authorized to engage by the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF"), or Article II of the Constitution.

The "Guantánamo Myth" unravels when the reader focuses on what the record actually says. General Hood (who was not in Afghanistan himself, and never tells us where he learned what he has repeated in his affidavit) says that Petitioners received "training in, among other things, the use of small arms." That is, the general says, they were taught how to disassemble and assemble firearms, how to clean them, how to load, handle, aim and fire them. If this allegation is true, then Petitioners received the same "weapons training" that thousands of Americans lawfully receive every day.[8]

---

[6] Petitioners should not be confused with, for example, Sayed Rahmutullah Hashemi, the former Taliban spokesman who today is a freshman at Yale. *See* Chip Brown, *The Freshman*, N.Y. TIMES MAG., Feb. 26, 2006, at 55.

[7] There is no record evidence that any Taliban personnel were at the "camp."

[8] *See e.g.*, National Rifle Ass'n, Basic Firearm Training Program, http://www.nrahq.org/education/training/find.asp?State=VA&Type= (weapons training offered at seventy-two different places in Virginia

Petitioners bear no animosity toward America and (remarkably) share the admiration for America so common to Uighurs regularly admitted here as political refugees from China. Uyghur Br. 9. If Petitioners are "dangerous," then so are the millions of Americans who daily receive the same weapons training that Petitioners are accused of receiving. Indeed, "[t]he United States believes that the responsible use of firearms is a legitimate aspect of national life. . . . We . . . do not begin with the presumption that all small arms and light weapons are the same or that they are all problematic." John R. Bolton, Under Sec'y for Arms Control and Int'l Sec. Affairs, Dep't of State, U.S. Statement at Plenary Session to the UN Conf. on the Illicit Trade in Small Arms and Light Weapons in All its Aspects (July 9, 2001), *available at* http://www.state.gov/t/us/rm/janjuly/4038.htm.

The Executive's words of resonance, powerful as they may be in the court of public opinion, should be impotent in this Court. In particular, they should not be permitted to drown out one simple truth: *the Executive's own self-created process has found to be non-existent the only asserted basis for imprisoning these Petitioners.*

More remarkable still is the Executive's suggestion that it has indulged Petitioners' request not to return to their "native" country, is doing them a favor by not returning them to China, and is "hosting" them while it diligently seeks on their behalf a better situation. Opp. 13. But they were not living in China, bought in China, or held in China. The prisoners of war referred to by the Executive, *see id.*, were soldiers who had lived in China and North Korea before marching out with their armies. Petitioners were *not* soldiers and were living *outside* China when the Executive seized them.

The Executive itself has created the very circumstances that it says bars any relief for Petitioners. It has known for years that

---

alone); Colin Harrison, *High: Vegas on $1,000 a Day*, N.Y. TIMES, Mar. 19, 2006 (Uzis, AK-47s, and Mac-10s are available for rent at the Las Vegas Gun Range and Firearms Center); Cumberland Tactics, http://www.guntactics.com/page6.php (offering "urban carbine" training).

Petitioners should not be at Guantánamo. Resettlement abroad has become all but hopeless, as the Executive long ago persuaded the rest of the world that Guantánamo prisoners are terrorists. The stain of this libel is indelible. Of the many wrongs done to the Petitioners, it may be the cruelest.[9]

B. The Petition Merits Certiorari Review.

1. The Act does not apply here and is not retroactive.

The Act has no bearing on this case because, by its terms, it applies only to actions seeking "to determine the validity of any final decision of a [CSRT] that an alien *is* properly detained as an enemy combatant." 28 U.S.C. § 2241(2)(A) (emphasis supplied). Since Petitioners seek to vindicate, not challenge, the CSRT's decision that they are *not* enemy combatants, the Act is inapplicable here, as the Executive explicitly concedes. Opp. 10 n.4; Brief for Appellees, *Qassim v. Bush* (D.C. Cir. No. 05-5477, filed March 15, 2006) at 19 (stating that the Act "does not provide any remedy to petitioners in this case"). *Rasul* thus applies unchanged -- unless the Act is read to cut off *any* judicial challenge to Petitioners' imprisonment.[10]

The Act is not retroactive in any case, as demonstrated in briefs and argument presented to this Court in *Hamdan v.*

---

[9] Justice Jackson wrote of Ignatz Mezei, the alien stranded at Ellis Island, "Since we proclaimed him a Samson who might pull down the pillars of our temple [Mezei was a suspected communist], we should not be surprised if peoples less prosperous, less strongly established and less stable feared to take him off our timorous hands." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 220 (1953) (Jackson, J., dissenting).

[10] As discussed above, this is the remarkable argument the Executive now wants to make. Of course, application of the Act to prisoners who have been cleared by a CSRT would create insuperable Suspension Clause issues. *See Hamdan v. Rumsfeld*, No. 05-184 March 28, 2006 Oral Arg. Tr. 48 ("Hamdan Tr."). For this and other reasons, if the Act were deemed to apply here, it would have to be construed to provide a remedy to avoid unconstitutionality.

Rumsfeld, No. 05-184,[11] and in the court of appeals in *Al Odah, Khaled A.F. v. United States*, No. 05-5064,[12] and *Boumediene v. Bush*, No. 05-5062.[13] Petitioners also have addressed the issue in the court of appeals.[14] But, again, that issue need not be reached in this case.[15]

2. The judiciary has the power and duty to provide a remedy for unlawful Executive imprisonment.

Contrary to the Executive's contention that Petitioners' imprisonment is lawful because the AUMF authorized their capture, *see* Opp. 11-12, Congress never authorized the President to purchase from Pakistan and export to Guantánamo opponents of Chinese communism. But even if it had that would not explain why Petitioners remain in captivity four years later. Thus the Executive is forced to invent a "wind up" power, *see* Opp. 12-14, presaging its approach in any other cases in which a detainee is exonerated by a fair process and confirming the need for immediate review. It cites no legal authority and points to inapposite history involving North Korean and Chinese soldiers taken on Korean battlefields and being returned to their homelands, and the Geneva-compliant, six-months-and-done post-war operations of the First Gulf War. It never explains what, if anything, limits this power. If the Executive may lawfully seize

---

[11] *E.g.*, Brief Amici Curiae of More than 300 Detainees Incarcerated at U.S. Naval Station, Guantánamo Bay, Cuba, and their Family Members, in Support of Petitioner and in Support of Jurisdiction (filed Jan. 6, 2006).

[12] *See* Guantánamo Detainees' Supplemental Briefs Addressing the Effect of the Detainee Treatment Act of 2005 on this Court's Jurisdiction Over the Pending Appeals, filed Jan. 25 and March 1), 2006)).

[13] *See* Supplemental Briefs of Appellants Regarding Section 1005 of the Detainee Treatment Act of 2005, filed Jan. 25 and Mar. 10, 2006)).

[14] *See* Brief of Petitioners-Appellants and Reply Brief of Petitioners-Appellants *Qassim v. Bush* (D.C. Cir. No. 05-5477, filed Feb. 10, 2006 and March 22, 2006, respectively).

[15] For these reasons too, there is no basis to hold the petition pending a decision in *Hamdan*, a case that presents entirely distinct issues.